80-1541

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

EAST CARROLL PARISH POLICE JURY and
EAST CARROLL PARISH SCHOOL BOARD, et. al.,
Petitioners,

versus

STEWART MARSHALL,
Respondent.

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the case is moot due to the promulgation of the 1980 Decenial Census.

2. Whether the decision of the Court of Appeals conflicts with this Court's decision in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

3. Whether the Court of Appeals clearly erred in determining that the 1979 redistricting plan in question was a court-ordered rather than a legislatively enacted plan.

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent prays that this Court deny the Petition for Writ of Certiorari sought by Petitioners to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on October 31, 1980.

STATEMENT OF THE CASE

In earlier rounds of litigation in this case the Court of Appeals, *en banc*, held that at-large elections, proposed by the Defendant-Petitioners and ordered by the District Court, violated the Constitution. *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973). This Court affirmed on the alternative non-Constitutional ground that since this was a Court-ordered plan, single-member districts were to be preferred absent exceptional circumstances. *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). On remand, the District Court called for the parties to submit proposed plans. The Defendant bodies passed resolutions approving a plan to be submitted to the Court. The plan was not submitted to the pre-clearance procedures required by Section 5 of the Voting Rights Act of 1965, for plans legislatively enacted. The District Court approved, as a remedy the plan proposed by Defendants and ordered it into force. The District Court did not refer the plan back to the governing bodies for legislative enactment. On appeal, the Fifth Circuit in *Marshall* v. *Edwards*, 582 F.2d 927 (1978) carefully applied the standards of *Wise* v. *Lipscomb*, 437 U.S. 535 (1978) and found the plan to be court-ordered rather than legislatively enacted. The use of contorted lines to achieve a pre-conceived racial ratio was held to go beyond the bounds of equitable appropriateness in court-ordered plans. East Carroll Parish then sought a Writ of Certiorari in this Court, on grounds virtually identical to those

in their present petition, and the Writ was denied on May 29, 1979. The case was, thus, once again returned to the District Court to follow the standards of equitable appropriateness in selecting a court-ordered plan. Once again, the District Court called for the parties to submit proposed plans of redistricting and he appointed a Special Master to recommend the appropriate remedy. Once again, the Defendants passed resolutions submitting their proposed plan to the Court. Once again, they did not seek Section 5 review of their plan, which would be necessary to give it the force of law. Once again, the Defendants' position in the District Court was that the plan did not have to be subjected to Section 5 scrutiny, because whatever plan was approved by the District Court would become a court-ordered plan, not subject to Section 5. The District Court preceded on this premise and after a remedial hearing at which Plaintiffs, Defendants, and the Special Master presented their proposed plans, the District Court selected the plan proposed by the Defendants. The District Court issued no Findings of Fact and Conclusions of Law, but only a Judgment and Order stating that "the East Carroll Parish Police Jury and School Board *hereby are apportioned*" according to the plan "*submitted*" by the Defendant-Petitioners (emphasis supplied).

The plan was not submitted to Section 5 review but was immediately put into force. No stays were sought or issued and elections were and continue to be conducted pursuant to this plan.

This plan is in force and will continue in force, until it is replaced by a new plan employing the now available 1980 census figures.

Your respondent Marshall appealed from the unsupported Judgment and Order of the District Court, on grounds that the District Court continued to ignore the standards of equitable appropriateness. Equitable standards, Marshall contended, were violated by the District Court (without assigned reasons) selecting as a remedy the plan proposed by Defendants, which in all significant respects was identical to that disapproved in *Marshall* v. *Edwards*, 582 F.2d 927 (1978), over a plan recommended by the Special Master: which followed the guidelines of that opinion; which respected compactness and contiguity, as well as natural, political, and traditional boundaries; which approached perfect population equality; and which did not employ jagged and contorted lines. The Court of Appeals agreed in its October 31, 1980 opinion. The Court of Appeals, however, noted that the 1980 census results would soon be available, and that any remedial plan now should be based on that data. Accordingly, the Court of Appeals remanded the case for evaluation of new plans devised with the 1980 census data, cautioning the Court to follow its earlier mandate.

REASONS FOR DENYING THE WRIT

I. *The Case is Now Moot by Virtue of the Promulgation of the 1980 U.S. Census.*

The controversy in the Court of Appeals below involved the proper delineation of single-member districts. The question of at-large elections was settled by earlier rounds of litigation. The single-member district plan now operable in East Carroll Parish (the plan supported by Defendant-Petitioners and ordered by the District Court in its March 1, 1979 Judgment and Order) was based upon 1970 Census data. The plan recommended by the Special Master to the District Court and the plan supported by Plaintiff-Respondent Marshall were also based upon the 1970 Census data. The 1980 Census was distributed to the state governments on April 1, 1981. Plaintiff's counsel has obtained that data, which shows population changes and shifts in East Carroll Parish which would necessitate redrawing the plan in force as well as the plan of the Special Master and the plan proposed by Plaintiff. The controversy over the plans drawn in accordance with the 1970 Census is dead. The Court of Appeals foresaw this likelihood when it remanded the case to the District Court to reconsider the proper delineation of single-member districts in light of the 1980 Census and in accordance with the Court's prior mandate. Given the posture of the case, your respondent respectfully submits that the case is not appropriate to be reviewed by a Writ of Certiorari and that the Court would have questionable jurisdiction over the case. A better disposition would be to allow the District Court to reconsider the case in light of the 1980 Census, as the Court of Appeals directed. For these reasons, the Writ of Certiorari should be denied.

II. *The Decision Below does not Conflict with this Court's Recent Decision in City of Mobile v. Bolden, 446 U.S. 55 (1980).*

Petitioners urge as a prime reason for granting the Writ that the decision below conflicts with this Court's recent decision in *City of Mobile* v. *Bolden,* 446 U.S. 55 (1980). Such is clearly not the case due to the applicability in Louisiana of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

A redistricting plan for a jurisdiction covered by Section 5 may not be enforced without Section 5 approval, unless it is a Court-ordered plan. *Connor* v. *Johnson,* 402 U.S. 690, 692 (1971). In the instant case, if the plan ordered into force by the District Court was not a "Court-ordered" plan (as Petitioner now contends), the plan would be subject to the requirements of Section 5 review. The plan in question has never been submitted for Section 5 review and if it were considered a "legislatively enacted" plan, it would be unenforceable due to the lack of Section 5 approval, without ever having to reach the Constitutional questions considered in *Mobile* v. *Bolden.*

III. *The Court of Appeals did not Clearly Err in Determining that the 1979 Redistricting Plan in Question was a Court-Ordered Rather than a Legislatively Enacted Plan.*

The redistricting plan ordered in force by the District Court, herein, is clearly a "Court-ordered" plan under the criteria of this Court's decision in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978). At issue in *Wise*, was a redistricting plan adopted by the City Council of Dallas, Texas after an unappealed decision declaring its former at-large plan unconstitutional. The trial court "afforded the city an opportunity as a legislative body for the City of Dallas to prepare a plan which would be constitutional." 437 U.S. at 538. The Dallas Council availed itself of the opportunity and passed a resolution which stated that the Council intended to *enact an ordinance* which would create a new plan of election. That plan was the subject of a hearing by the District Court which concluded that the plan was constitutionally acceptable. The City Council then formally enacted the ordinace. The District Court entered a subsequent written order approving the City plan as a valid legislative act. *Lipscomb* v. *Wise*, 399 F. Supp. 782 (N.D. Tex. 1975). Section 5 of the Voting Rights Act did not apply to Texas at the time of this case.

It was under these circumstances, that this Court in *Wise* found the Dallas plan to be legislatively enacted rather than Court-ordered. The circumstances of the instant case are vastly different from those in *Wise*. The Court of Appeals in *Marshall* v. *Edwards*, 582 F.2d 927, 932-933, carefully reviewed the criteria of *Wise*, applied it to the District Court's last effort to devise a plan, and found the plan to be Court-ordered. On remand,

the District Court made another attempt to devise an adequate plan under circumstances identical to those in its earlier effort: the Court called for proposals and even appointed a Special Master to make a recommendation; the governing bodies made a proposal by resolution which did not purport to enact the plan, but only to propose it to the Court; counsel for the governing bodies again took the position at the hearing that the plan had not been enacted, so it did not have to be submitted pursuant to Section 5; the District Court again clearly understood that it was developing a Court-ordered plan, rather than hearing a constitutional challenge to a legislative plan; the District Court's Order purported to put the plan immediately into effect without legislative enactment or Section 5 approval; the plan was viewed by the District Court, counsel for Defendants, and counsel for plaintiffs as a Court-ordered plan which was exempt from Section 5 review; and the plan was never submitted to Section 5 review. Under these circumstances, the Fifth Circuit, in its October 31, 1980 decision below, again found the plan to be a Court-ordered plan subject to the standards of equitable appropriateness.

Defendant-Petitioners reliance upon deference to the factual findings of the District Court in this regard, is misplaced. The District Court issued no Findings of Fact and Conclusions of Law as is required in injunctive rulings. More importantly, throughout the proceedings the District Court fully understood (as did the parties) that the hearing was to produce a Court-ordered plan which was not subject to Section 5 review and which need not be enacted by the governing bodies.

The crux of this matter is that the Defendants are again (as they did in *Marshall* v. *Edwards*) trying to characterize the plan to this Court as legislatively enacted, after having carefully taken all the steps to insure that the plan was Court-ordered in the District Court and even conceding in the District Court that the plan was "Court-ordered" in order to escape Section 5 review. Defendants-Petitioners are simply playing ducks and drakes with the judiciary. The plan in question was clearly properly characterized by the Court of Appeals as "Court-ordered" under any reasonable interpretation of *Wise*. The Writ should be denied as not presenting an issue of a magnitude worthy of review.

CONCLUSION

The Writ of Certiorari should be denied in this case for for the following reasons:

1. The case is moot by virtue of the promulgation of the 1980 U.S. Census.

2. The decision below does not conflict with this Court's decision in *Mobile* v. *Bolden* because of the applicability in Louisiana of the pre-clearance procedures of Section 5 of the Voting Rights Act to post-1964 legislatively enacted redistricting plans.

3. The decision below properly applied the standards of *Wise* v. *Lipscomb*, to conclude that the plan in question was a Court-ordered plan subject to the standards of equitable appropriateness.

The only issues presented by this case are stale and moot and are controlled by the peculiar facts of this case rather than being of a magnitude which would be worthy of this Court's grant of a Writ of Certiorari.

Respondent Marshall respectfully prays that the Writ of Certiorari sought herein be denied.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE

I, Stanley A. Halpin, Jr., Attorney for Respondent and a member of the Bar of the United States Supreme Court, do hereby certify that on this 22nd day of May, 1981, I served copies of the foregoing Response to Petition for Writ of Certiorari upon the attorney of record for Petitioners herein, Mr. George F. Fox, Jr., by mailing three copies of same, postage prepaid to him at his office at 301 Morgan Street, Lake Providence, Louisiana 71254.

STANLEY A. HALPIN, JR.
Counsel for Respondent.